Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

SAM C. BLAIR, JUDGE OF THE CIRCUIT COURT OF COLE COUNTY, MISSOURI,
PETITIONER,

VS.

STATE OF MISSOURI AT THE RELATION OF RAY B. LUCAS, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the court below has not yet been officially reported. It appears at pages 42 to 48 of the record, and also in 144 S. W. 2d 106. An application for rehearing was denied without opinion (R. 54).

II.

JURISDICTION.

1.

The statutory provision is Judicial Code, Section 237b as amended by Act of February 13, 1925, 43 Stat. 937 (U. S. C., Tit. 28, Sec. 344b).

2.

The date of the judgment is September 3, 1940 (R. 42). Motion for rehearing was duly filed and denied on November 9, 1940 (R. 54), and said judgment became final.

3.

That the nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237b, *supra,* appears from the following reasons:

The claim of federal constitutional rights was specifically set up in the petition filed in the Circuit Court of Cole County, Missouri (R. 10), and renewed at every stage of the case. On application for prohibition the Supreme Court of Missouri in its opinion specifically passed upon the federal rights claimed (R. 47, 48).

The federal right claimed is that, in denying the petitioner the right to enter into an enforceable contract with the representatives of a class of policyholders, and to be paid from funds, if any, secured for said class as the result of the rate litigation, the State of Missouri, through its Supreme Court, has denied the petitioner the equal protection of the laws, and due process of law, as guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is specially pleaded and invoked (R. 10, 25-28, 54). Incidental to this claim is a further contention of petitioner that the fund in question was and is a private one, belonging to individual policyholders, and in which the state

of Missouri has no interest at all; that the Superintendent of Insurance, who employed petitioner for said policyholders, is and was, the representative of said policyholders, who paid and impounded said fund, during a rate inquiry, and that when it was finally ordered returned to said policyholders, such fund became liable to such petitioner and his associate lawyers, on the theory that they were employed to recapture said fund, and having done so, said fund is liable for their payment. Under no conceivable theory can the state of Missouri have any interest in said fund.

The Missouri Supreme Court (R. 47) holds that petitioner and his associates, were employed, by the representative of said class and for the benefit of said class, but that petitioner cannot maintain a suit against the owners of said fund, policyholders, even though such policyholders have not complained, and might be willing for him to be paid from said fund, because certain sections of the Missouri Insurance Code as set out in the appendix (Sections 5679, 5686 and 5688) require him to be paid as an expense of the Insurance Department, from funds appropriated by the state legislature, to such department.

Such construction was alleged by petitioner to render said acts unconstitutional and to deny him due process of law, and the equal protection of the law as guaranteed him by Section 1 of the Fourteenth Amendment, and further denied him the right to contract (R. 53). Simply to allow him to appeal to the legislature for payment was no remedy at all, and denied him a judicial forum where his claim could be passed upon. Where regular employees of the state contract and understand that they are to be paid by legislative appropriations, it might be that they are accorded due process, but petitioner did not contract to be paid by the legislature, but contracted to be paid from a private fund, belonging to private individuals, in case, through his efforts, such fund was preserved and saved for said policyholders.

Section 5678, *supra* (see appendix), expressly authorized the employment of petitioner, but said section provides no method for payment; the contract, therefore, entered into to be paid from a private fund, if said fund was saved, violates no provision of the Missouri Insurance Code, and is not prohibited by any law of Missouri, and is really a matter which the state could not legislate on, because said fund is privately owned and the state does not or could not have any interest in the same.

Such statutes as construed contemplate that petitioner and his associates be paid only by an appropriation from the legislature, which affords no relief to petitioner at all, but relegates him solely and exclusively to the whim and the caprice of the legislature, and thus denies him a judicial forum.

III.

STATEMENT OF CASE.

Petitioner, a practicing lawyer and taxpayer of the State of Missouri, claims he has been denied the right to maintain a suit against the individual members of a class, to recover from a fund secured for said class, through his representation of them, and relegated to the Missouri State Legislature for his payment (R. 46). Petitioner entered into a contract with the Superintendent of Insurance (representative of a class of policyholders effected), to protect a fund to be impounded by said policyholders, pending a rate review as to the reasonableness of fire insurance rates in Missouri; said contract provided that if petitioner was successful in the rate litigation and prevented an increase, the fund belonging to private persons (policyholders) should be liable to him for the services rendered such private persons (policyholders) and the amount of the fee fixed by the court. Although the State of Missouri has no interest in the fund at all, and although it belongs to private individuals, the Supreme Court of Missouri held that he could not maintain a suit against said private individuals (policyholders) to re-

cover from said fund, belonging to them, but that as he was employed by the Superintendent of Insurance, he could only be paid as an expense of the Insurance Department, that is, from funds appropriated to the Insurance Department by the legislature, from fees paid into said department by insurance companies (R. 46-48). The policyholders, although sued in the Circuit Court of Cole County, made no objection to said suit, and did not join in the petition for prohibition filed in the Missouri Supreme Court.

Petitioner claims that when the Missouri Supreme Court denied him the right to maintain a suit against individuals, to recover from them, money held by the Superintendent of Insurance for them, and afforded him a nonenforceable remedy of applying to the legislature for relief, it infringed upon his right to enforce a contract in a judicial forum, thereby denying him due process of law and the equal protection of the law as guaranteed him by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which was specially pleaded and invoked and kept alive throughout the litigation.

IV.

ERRORS BELOW RELIED UPON HERE; SUMMARY OF ARGUMENT.

The points petitioner urges on this court are in summary form as follows:

1. The State of Missouri denied petitioner "due process of law" by excluding and denying him access to the courts of Missouri to enforce a contract entered into with the representative of a class (policyholders) to recover for services rendered said class.

2. The State of Missouri denied petitioner the equal protection of the laws, by denying him the right to contract with the representative of a class (policyholders) in a normal way, to recover from a fund belonging to said class, which fund was preserved, secured and captured for said class, solely through his efforts.

3. The State of Missouri denied petitioner due process of law, and the equal protection of the laws, by denying him the equitable right to recover from a fund belonging to a class, and secured through his efforts. Such right existing independent of contract.

ARGUMENT.

POINT I.

The State of Missouri Denied Petitioner "Due Process of Law" by Excluding and Denying Him Access to the Courts of Missouri to Enforce a Contract Entered into with the Representative of a Class (Policyholders) to Recover for Services Rendered Said Class.

The opinion of the Supreme Court of Missouri (R. 42-48; 144 S. W. 2d 106), after holding that plaintiff has a legal contract of employment with the representative of a class (policyholders), denied him the right to enforce said contract in any of the courts in Missouri on the ground that the representative of said class had no right to bind the fund saved for said class, because petitioner was employed under a statute of Missouri (Section 5678. See appendix) to enforce the insurance laws of the state, and that under such circumstances he could only be paid by the Insurance Department, as an expense of such department, from funds appropriated to such department, by the Missouri legislature.

Such holding denied petitioner "due process of law" as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, and excludes him from each and every court in Missouri, and relegates him solely and exclusively to the whim and caprice of the legislature (this point was saved and preserved throughout the proceedings (R. 10, 25, 26, 27, 28, 53)).

Such right is an unenforceable one because the legislature does not even have to give petitioner a hearing, and may or may not appropriate, as it sees fit. Such hearing, if given, would be a non-judicial one in which no right of appeal exists. The following cases decide

that such holding was a violation of petitioner's right as alleged:

No decision of this court has been found denying the litigant the right to enforce a contract in a judicial forum, but in *Missouri ex rel. Gaines* v. *Canada, Registrar of the University of Missouri, et al.*, 305 U. S. 337, this court held that a Negro could not be excluded from the University of Missouri, and in the instant case, petitioner and his associate lawyers were excluded and denied the right of entry into any court in Missouri, but told that the only relief they had was to appeal to the legislature and subject themselves to its whim or caprice. They were excluded from all courts.

The right to proceed in a judicial forum was claimed by petitioner in the Supreme Court of Missouri, and denied (R. 48), and *Beidler* v. *Tax Commission*, 282 U. S. 1, 8; *Fiske* v. *Kansas*, 274 U. S. 380, and *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261, decide that where a federal right has been asserted and denied, it is the province of this court to ascertain whether the conclusion of the state court has adequate support in the evidence. *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 745, decides that it is the prerogative of this court to inquire not only whether the federal right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. *Bank of Minden et al.* v. *Clement*, 256 U. S. 126, decides that any law which releases a part of the obligation in a contract impairs it (R. 53). (The opinion below holds petitioner's contract of employment legal but after full performance denies him any right of judicial forum to enforce it.) *Barbier* v. *Connolly*, 113 U. S. 27, decides that all persons are entitled to access to the courts of the country for the protection of their persons and property. *Cincinnati Street Railway Co.* v. *Snell*, 193 U. S. 30, decides that the state must provide a forum in which a trial may be had; that

any forum so provided by a state provides equal protection of the law if such method "gives reasonable notice and affords fair opportunity to be heard before the issues are decided" which petitioner claims here the decision of the Supreme Court of Missouri denies him.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill, Treasurer*, 281 U. S. 673, decides that one cannot be deprived of his property, or any of his rights, without being given first an opportunity to be heard in court; that to relegate him to an administrative body which is not subject to judicial control is no remedy; and that such violation exists when that result is accomplished by the state judiciary because the federal guarantee of due process extends to state action through its judicial as well as its legislative, executive or administrative branch of government.

POINT II.

The State of Missouri Denied Petitioner the Equal Protection of the Laws, by Denying Him the Right to Contract with the Representative of a Class (Policyholders) in a Normal Way, to Recover from a Fund Belonging to Said Class, Which Fund Was Preserved, Secured and Captured for Said Class, Solely Through His Efforts.

The Missouri Supreme Court held (R. 47) that petitioner's contract of employment with the Superintendent of Insurance, as the representative of a class (policyholders), was a valid one, and not in violation of any of the laws of Missouri, but held it could not be enforced against a fund secured for said class (policyholders) through the effort of petitioner and his associate attorneys, because, of certain Missouri statutes (see appendix) which provided a method for the payment of all expenses of the Insurance Department, and that plaintiff could only be paid as other expenses of such department were paid. Petitioner claims that said statutes

deal solely with ordinary and current expenses of said Insurance Department and do not attempt in any way to destroy the contract to be paid from said fund, recovered for such class. That to deny him the right to contract with private individuals (owners of said fund) denies him the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment because other attorneys throughout America are allowed to recover from a fund secured through their effort, for a class, on the theory that a rate making body or a body authorized to regulate rates do so as the representative of the public, and, being the representative of the public, may contract for the public as to compensation of attorneys employed to represent the public.

Lindheimer et al. v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658, established the right of telephone users in the city of Chicago to a reduced rate. The litigation was carried forward by the Illinois Public Service Commission, and the decision in the lower federal court was in favor of the telephone company. The City of Chicago intervened upon behalf of telephone users in said city, and employed three Chicago lawyers to appeal the case to the Supreme Court of the United States, where it was reversed, and the right to reduced rates sustained. Thereupon said three private attorneys applied to the three-judge court where the case had been tried, for an allowance against the fund, which had been impounded during the litigation. On the theory that through their efforts said fund was saved and preserved for said telephone users, and such court allowed these attorneys a percentage fee to be paid from said impounded fund, belonging to said telephone users. The opinion was written by Judges Evans, Sparks and Wilkerson, and we have set the same out in the appendix because it is a very able discussion of the rights of attorneys, employed by rate making bodies, to recover from a fund saved to the public. This opinion is not reported in the books, but

was secured from the clerk of that court and we ask a careful reading of it.

Haynie, Parks & Westfall v. *Camden Gas Corporation et al.*, 186 Ark. 842, 56 S. W. 2d 419, decides that attorneys employed by the City of Camden, to represent the city and users of gas in such city, could be paid from a fund impounded and accumulated during the litigation, on the theory that such lawyers represented the users of gas, as a class.

The Superintendent of Insurance in Missouri has supervision over the regulation of fire insurance rates, and it is the universal rule throughout the United States that a rate making body acts for the public, and on behalf of said public:

Lincoln Gas Cases, 256 U. S. 512, 41 S. Ct. 558 (The City Council regulating gas rates).

Arkadelphia Milling Co. v. *Coal Co.*, 249 U. S. 134, 39 S. Ct. 237 (State Board regulating railroad rates).

In re Englehard & Sons Co., Petitioner, 231 U. S. 646, 34 S. Ct., l. c. 259 (City Council regulating telephone rates).

Lindheimer et al. v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658, memorandum opinion in appendix (City of Chicago, Intervenor).

Wright et al. v. *Gas Co.*, 297 U. S. 537, 56 S. Ct. 578 (State Commission regulating gas rates).

O'Connell v. *Pacific Gas Co.*, 19 F. 2d 460 (City regulating gas and electric rates).

State ex rel. Abeille Insurance Co. v. *Sevier, J.*, 335 Mo. 269, 73 S. W. 2d 361 (Missouri Superintendent of Insurance regulating fire insurance rates).

It being the universal rule that a body vested with authority to regulate rates acts as the representative of the public, it naturally follows that to limit the right of

such body in the employment of counsel to represent such public infringes upon the right of contract, as the matter is purely a private one in which the state has no interest. It is also a denial of due process of law and the equal protection of the law as guaranteed by Section 1 of the Fourteenth Amendment.

POINT III.

The State of Missouri Denied Petitioner Due Process of Law, and the Equal Protection of the Laws, by Denying Him the Equitable Right to Recover from a Fund Belonging to a Class, and Secured Through His Efforts. Such Right Existing Independent of Contract.

Sprague v. *Ticonic National Bank et al.*, 307 U. S. 777, is controlling in this case, and decides that where one bondholder brings a proceeding to establish the validity of his bond, and in so doing establishes the validity of similar bonds belonging to other persons similarly situated that "solicitors fees" from the owner of such other bonds, even though not a party to the litigation, and even though no contract exists with them, should be required to contribute to such "solicitors fees" on the theory that where a member of a class renders a service, inuring to the benefit of other members of a class, such other members shall pay part of the costs. Other authorities supporting this view are:

Lindheimer et al. v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658 (memorandum opinion in appendix).

Haynie, Parks & Westfall v. *Gas Co. et al.*, 186 Ark. 842, 56 S. W. 2d 419.

CONCLUSION.

It is conceded that petitioner Weatherby and his associates rendered a valuable service to the policyholders, members of a class, and, as shown by the record, no policyholder has indicated any desire to prevent payment from

said fund. This litigation has been carried on by the Superintendent of Insurance (successor to the employing Superintendent) and not the policyholders. A very small payment on each policy would afford a reasonable fee to petitioner and his associates.

This appears to be the first time that the highest court of a state has ruled that attorneys may not be paid from a fund recovered for individuals through their efforts. Also it appears to be the first time in the history of the legal profession that lawyers have been driven by the courts to the legislature to seek payment for services rendered individuals. This legislative recourse does not afford petitioner a chance to examine witnesses, to appeal from an adverse action, and affords him no remedy at all.

It is respectfully submitted that the highest considerations of public justice require that this court issue its writ of certiorari and review and reverse the judgment of the Supreme Court of Missouri in this case.

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Attorney for Petitioner.